United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original w/ affidavit

75-7552

To be argued by
WILLIAM G. BALLAINE

B

P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7552

SAMUEL SCHEIN, an attorney,
Plaintiff-Appellant,

—v.—

The U.S.A., President LYNDON B. JOHNSON, The INTERNAL REVENUE SERVICE, Commissioner DONALD L. ALEXANDER, DIRECTOR INTELLIGENCE DIVISION, N. ALAN LONG and NEW YORK CITY DISTRICT DIRECTOR, CHARLES A. CHURCH,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York,
Attorney for Defendants-Appellees.

WILLIAM G. BALLAINE,
STEVEN J. GLASSMAN,
Assistant United States Attorneys,
Of Counsel.

WGB:lq
M-1238

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-7552

SAMUEL SCHEIN, an attorney,

Plaintiff-Appellant,

- v -

The U.S.A., et al.,

Defendants-Appellees.

BRIEF OF DEFENDANTS-APPELLEES

THOMAS J. CAHILL
United States Attorney for the
Southern District of New York
Attorney for Defendants-
Appellees.

WILLIAM G. BALLAINE,
STEVEN J. GLASSMAN
Assistant United States Attorneys,

Of Counsel

WGB:lq
M-1238

TABLE OF CONTENTS

	Page
Statement of the Case	1
Issue Presented	2
Facts	2
Argument:	
POINT I The Court Lacked Jurisdiction Over the Subject Matter of Plaintiff's Claim.	6
POINT II Plaintiff's Complaint Failed to State a Claim Upon Which Relief Can Be Granted	9
POINT III The Action is Barred By Res Judicata	10
Conclusion.	12
Legal Appendix of Unreported Decisions	13
Divonne v. Internal Revenue Service, 75 Civ. 912 (S.D.N.Y. July 14, 1975)	Ex. 1
Franklin State Bank v. United States 72 Civ. 2135 (S.D.N.Y. Sept. 29, 1975) . . .	Ex. 2
Ruderer v. Mitchell, 74 Civ. 1019 (S.D.N.Y. Aug. 30, 1974)	Ex. 3

WGB:lq
M-1238

Table of Authorities

Cases

	Page
Barker v. Lein, 366 F.2d 757 (1st Cir. (1966)	9
Bialowas v. United States, 443 F.2d 1047 (3rd Cir. 1971)	7
Chase v. United States, 60 F. Supp. 211 (Ct. Cl. 1945)	9
Divonne v. Internal Revenue Service, 75 Civ. 912 (S.D.N.Y. July 14, 1975)	7, 8, 9
Franklin State Bank v. United States, 72 Civ. 2135 (S.D.N.Y. Sept. 29, 1975)	7
Frost v. Bankers Commercial Corp., 11 F.R.D. 195 (S.D.N.Y. 1951), aff'd, 194 F.2d 505 (2d Cir. 1952)	11
Ruderer v. Department of Justice, 389 F. Supp. 549 (S.D.N.Y. 1974)	11
Ruderer v. Mitchell, 74 Civ. 1019 (S.D.N.Y. Aug. 30, 1974)	11
Saracena v. United States, 508 F.2d 1333 (Ct. Cl. 1975)	9
Schein v. United States, 352 F. Supp. 182 (E.D.N.Y. 1972)	5, 8, 10
Walley v. United States, 366 F. Supp. 268 (E.D. Pa. 1973)	7

Statutes

5 U.S.C. § 701, et seq	8
26 U.S.C. § 7623	6, 9
28 U.S.C. § 1346(a)(2)	8
28 U.S.C. § 1346(b)	2, 6, 7, 8
28 U.S.C. § 1361	8
28 U.S.C. § 2675	5, 7
28 U.S.C. § 2680(a)	6, 7

WGB:lq
M-1238

Rules and Regulations

Rule 12(b)(1) Fed. R. Civ. Proc. 1
Rule 12(b)(6) Fed. R. Civ. Proc. 1

26 C.F.R. § 301.7623-1 . . . . . 6, 7

Other Authorities

1B Moore's Federal Practice (2d ed. 1974). . . . 10

WGB:lq
M-1238

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-7552

SAMUEL SCHEIN, an attorney,

Plaintiff-Appellant,

- v -

The U.S.A., et al.,

Defendants-Appellees.

BRIEF OF DEFENDANTS-APPELLEES

Statement of the Case

This is an appeal by plaintiff-appellant Samuel Schein from an endorsed order signed September 9, 1975 by the Honorable Kevin Thomas Duffy granting defendants' motion to dismiss the complaint, pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure ("Fed.R.Civ.Proc."), for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

WGB:lq
M-1238

Plaintiff filed a complaint requesting money damages from defendants as a result of defendants' purported negligent conduct in failing to provide plaintiff with an informant's reward for information given to officials of the Internal Revenue Service (the "IRS"). The named defendants included the United States, the IRS, Lyndon Johnson, Donald Alexander, the Commissioner of Internal Revenue, N. Alan Long, the Director of the Intelligence Division of the IRS and Charles A. Church, the District Director of Internal Revenue, Manhattan District. Jurisdiction was alleged to lie under 28 U.S.C. § 1346(b).

Issue Presented

Did the District Court properly dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted?

Facts

In 1956, plaintiff filed an application for reward with the Director of the Intelligence Division of the IRS in Washington, D.C. for having reported the taking of a tax loss by Glen Alden Corporation. The matter was referred to the District Director of Internal Revenue, Scranton District, who disallowed the claim on the ground that no additional taxes or penalties were recovered as a result of the information furnished by plaintiff. (Complaint ¶ 13).

In 1958, plaintiff submitted a separate reward claim for information relating to the tax status of List Industries Corp. and Gera Corp. (Complaint ¶'s 24, 25). This claim was disallowed by the District Director of Internal Revenue, Manhattan District who concluded that there was "no basis for the allowance of a reward". (Complaint ¶ 26).

In 1960, plaintiff filed yet another reward claim, this time relating to the merger of List Industries Corp. and Glen Alden Corp. (Complaint ¶17). After filing this claim, plaintiff allegedly furnished legal memoranda to the IRS and copies of purportedly relevant state court decisions. (Complaint ¶s 29-49). In November, 1960, the Scranton District Director's office advised plaintiff that no reward could be allowed for information previously known to the IRS or for information available in public records. (Complaint ¶ 52).

In 1961, plaintiff requested reconsideration of the disallowance of his 1958 claim. (Complaint ¶'s 55-56). Following plaintiff's extended correspondence to various federal officials (Complaint ¶'s 57-88), the Manhattan District Director, in May, 1965, advised plaintiff that his information could not form the basis for granting any informant's reward. (Complaint ¶ 89.)

Undaunted, plaintiff sent a so-called appeal for review and reconsideration to then President Lyndon B. Johnson and to the Director of the Intelligence Division of the IRS. (Complaint ¶ 92). As a result, the Manhattan District Director, in July, 1965, again wrote to plaintiff, reiterating his prior denials and the reasons for these denials. (Complaint ¶ 93). Despite this communication, plaintiff persisted in writing to federal officials, including President Johnson. (Complaint ¶s 94-99). As a result, in March, 1969, the Manhattan District Director communicated once more with plaintiff, advising that no reward could be granted where information, no matter how valuable, did not result in the collection of any additional taxes or where additional taxes were collected, but not as a direct result of information submitted. (Complaint ¶ 100).

In February, 1972, plaintiff instituted suit in the United States District Court for the Eastern District of New York against the United States, the Commissioner of Internal Revenue and the Manhattan District Director. (Complaint ¶ 121). Alleging essentially the same facts as are set forth in the instant action (Ex. A to Affidavit of William G. Ballaine, Assistant United States Attorney, sworn to August 12, 1975 ["Def. Aff."]),* plaintiff framed that action as a suit to review the denial of his repeated claims for an informant's

* Filed in District Court in connection with defendants' motion to dismiss plaintiff's complaint.

reward. Apparently, plaintiff later advanced an alternative claim for compensation on a quantum meruit basis for legal services rendered. The District Court, by the Honorable Edward R. Neaher, granted defendants' motion to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. See Schein v. United States, 352 F. Supp. 182 (E.D.N.Y. 1972).

In March, 1975, plaintiff commenced a second action, again in the United States District Court for the Eastern District of New York, this time claiming breach of an implied contract and also claiming injury and negligent wrongdoing. (Complaint ¶ 130). The pleaded facts were essentially the same as those alleged in his first action and as alleged in the instant action. (Ex. B to Def. Aff.) This second suit was dismissed on the Court's own motion for lack of subject matter jurisdiction. (Ex. C to Def. Aff.).

In early June, 1975, plaintiff filed an administrative claim, pursuant to 28 U.S.C. §2675, but withdrew this administrative claim fifteen days later. (Complaint ¶3). On June 24, 1975, plaintiff commenced the instant action, which was dismissed on September 9, 1975.

WGB:lq
M-1238

ARGUMENT

POINT I

The Court Lacked Jurisdiction Over the Subject Matter of Plaintiff's Claim

Plaintiff bases jurisdiction upon 28 U.S.C. § 1346(b), which grants subject matter jurisdiction over claims against the United States for negligent or wrongful acts or omissions of Government employees. Plaintiff cannot rely upon 28 U.S.C. §1346(b), however, because of the exclusionary language of 28 U.S.C. § 2680(a). Section 2680(a) provides that subject matter jurisdiction is not available under 28 U.S.C. § 1346(b) where plaintiff's tort claim is based upon "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. §2680(a).

From his own complaint, it is apparent that plaintiff's tort claim is premised directly upon the action of Government officials in denying him an informant's reward. Such an award may only be approved pursuant to the authority of 26 U.S.C. §7623 and 26 C.F.R. § 301.7623-1 thereunder. Under 26 U.S.C. §7623, the Secretary of the Treasury or his delegate "is authorized to pay" as an award such sums he "may deem necessary". 26 C.F.R. §301.7623-1, provides inter alia:

> "(a) *** A district director may approve such reward as he deems suitable for information that leads to the detection and punishment of any person guilty of violating any internal revenue law ***.
>
> * * *
>
> "(c) *** All relevant factors *** shall be taken into account by a district director in determining whether a reward shall be paid, and, if so, the amount thereof. ***"

This authority quite clearly leaves approval or disapproval of an award to the discretion of the District Director of Internal Revenue.

As a result, plaintiff's claim of allegedly negligent conduct flows directly from the exercise of discretion by Government officials. Thus, plaintiff's tort claim falls squarely within the exclusionary language of 28 U.S.C. § 2680(a), precluding subject matter jurisdiction under 28 U.S.C. § 1346(b). This very legal conclusion was reached by the District Court in Divonne v. Internal Revenue Service, 75 Civ. 912 (S.D.N.Y. July 14, 1975) (Ex. 1 to Legal Appendix) where, as here, the plaintiff sued in tort, claiming the right to an informant's reward.*

---

* In addition to jurisdiction being barred by 28 U.S.C. § 2680(a), jurisdiction does not lie under 28 U.S.C. § 1346(b) because plaintiff failed to file his administrative claim and receive a denial, or wait six months without receiving a decision. 28 U.S.C. § 2675(a); Franklin State Bank v. United States, 72 Civ. 2135 at pp. 8-9 (S.D.N.Y. Sept. 29, 1975) (Ex. 2 to Legal Appendix); Walley v. United States, 366 F. Supp. 268 (E.D. Pa. 1973); see Bialowas v. United States, 443 F.2d 1047 at 1049 and n.2 (3rd Cir. 1971). Given plaintiff's litigating history, however, defendants-appellees urge that the District Court's order be affirmed, but not solely on the basis of plaintiff's failure to comply with administrative exhaustion requirements.

Not only is jurisdiction unavailable under 28 U.S.C. §1346(b), the provision relied upon in plaintiff's complaint, no other jurisdictional basis may be found to support plaintiff's claim. In his initial suit in the Eastern District of New York, plaintiff viewed his factual allegations as stating a claim for review of decisions made by IRS officials, presumably claiming jurisdiction under 5 U.S.C. § 701, et seq., or as stating a quantum meruit claim for legal services rendered, presumably claiming jurisdiction under 28 U.S.C. § 1346(a)(2). The United States District Court for the Eastern District of New York properly held that no jurisdiction existed under 5 U.S.C. § 701, et seq., or under 28 U.S.C. § 1346(a)(2) or even under 28 U.S.C. § 1361. Schein v. United States, supra, 352 F. Supp. 182 at 186. Similarly, see Divonne v. United States, supra at pp. 5-6. Since these statutory provisions are the only remaining jurisdictional provisions which have even colorable application to the factual allegations in the instant action, it is clear that there is no jurisdictional support for plaintiff's suit.

POINT II

Plaintiff's Complaint Failed to State a Claim Upon Which Relief Can Be Granted

Plaintiff's action is premised on allegations of negligence by defendants. A reading of the complaint makes clear that the negligent conduct alleged is defendants' individual and collective refusal to provide plaintiff with the informant's reward which he persistently demanded. Assuming the truth of the factual allegations, plaintiff's complaint does not state a claim sounding in tort at all. See Divonne v. Internal Revenue Service, supra at p. 5. In any event, a long line of decisions, treating a claim for an IRS informant's reward as in the nature of a contract claim, have concluded that any such claim for a reward must be dismissed for failure to state a claim upon which relief can be granted. Barker v. Lein, 366 F.2d 757 (1st Cir. 1966); Divonne v. Internal Revenue Service, supra; Schein v. United States, supra, 352 F. Supp. 182; Chase v. United States, 60 F. Supp. 211 (Ct. Cl. 1945); see Saracena v. United States, 508 F.2d 1333, 1336 (Ct. Cl. 1975). The rationale of these decisions, that 26 U.S.C. § 7623 does not create any fixed obligation to pay a reward, requires the conclusion that defendants in the instant action were under absolutely no legal duty to accede to plaintiff's persistent demands for a reward. Accordingly, defendants' refusal to provide a reward cannot be considered negligent and, regardless

of plaintiff's allegations of personal injury, his purported tort claim fails to state a claim upon which relief can be granted.

POINT III

The Action is Barred By Res Judicata

Three years before commencement of this action, plaintiff filed a complaint in the United States District Court for the Eastern District of New York setting forth essentially the same factual allegations as are made in the instant action. (Compare Ex. A to Def. Aff. and plaintiff's Complaint herein).* This first action was dismissed by the District Court for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. Schein v. United States, supra, 352 F.Supp. 182. Dismissal for failure to state a claim without the reservation of any issue is presumed to be upon the merits, unless the contrary appears of record and is stated in the decree; the judgment has the effect of res judicata in a subsequent suit on the same claim. 1B Moore's Federal Practice ¶0.409[1] at p. 1005 (2d ed. 1974).

* In the instant complaint, plaintiff adds conclusory allegations of negligence, corruption and wrongdoing by defendants and claims that personal injuries resulted. However, the events alleged by plaintiff to provide the factual basis for his conclusory allegations are in all essentials the same as the events described in his first complaint filed in the Eastern District of New York.

The only difference between plaintiff's first complaint and the present one is that the first suit was viewed by plaintiff as one to review an administrative decision or as a quantum meruit claim, whereas the instant action adds conclusory allegations of negligence and personal injury in an attempt to make it colorably sound in tort. However, as Judge Weinfeld observed in Ruderer v. Department of Justice, 389 F. Supp. 549 at 550 (S.D.N.Y. 1974):

> "Plaintiff cannot escape the effect of prior adverse determinations by clothing the claim[s] in different garb [citing Frost v. Bankers Commercial Corp., 11 F.R.D. 195 (S.D.N.Y. 1951), aff'd, 194 F.2d 505 (2d Cir. 1952)]."

Nor does it matter that plaintiff has now named additional federal defendants whom he did not make party to his first action. Res judicata properly may be invoked against a plaintiff who has previously asserted essentially the same claim but against different defendants where there is a close or significant relationship between successive defendants. Ruderer v. Mitchell, 74 Civ. 1019 (S.D.N.Y. Aug. 30, 1974) (Ex. 3 to Legal Appendix).

Plaintiff's complaint, though clothed as a tort case, is in all essentials the same as his first suit, which was dismissed for failure to state a claim upon which relief

WGB:lq
M-1238

can be granted. There is an obvious and significant relationship between the defendants named in that suit and those named here. Accordingly, plaintiff's present action is barred under principles of res judicata.

CONCLUSION

For the reasons set forth above, the order of the United States District Court for the Southern District of New York dismissing plaintiff's complaint should be affirmed.

Dated: New York, New York
December 12, 1975

Respectfully submitted,

THOMAS J. CAHILL
United States Attorney for the
Southern District of New York
Attorney for Defendants-Appellees

WILLIAM G. BALLAINE
STEVEN J. GLASSMAN
Assistant United States Attorneys

Of Counsel

WGB:lq
M-1238

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-7552

SAMUEL SCHEIN, an attorney,

Plaintiff-Appellant,

-v-

The U.S.A., et al.,

Defendants-Appellees.

LEGAL APPENDIX OF UNREPORTED DECISIONS

Mr. Barth
75-0682.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

JEAN DE LA FOREST DIVONNE, :

Plaintiff, :

-against- :

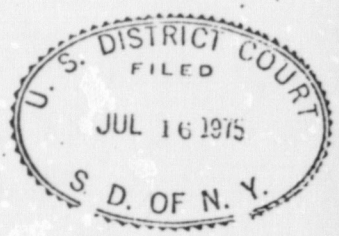
INTERNAL REVENUE SERVICE, :

Defendant. :

- -x

#42807

75 Civ. 912
Pro Se



A P P E A R A N C E S:

Mr. Jean de la Forest Divonne
345 West 86th Street
New York, New York 10024
Plaintiff pro se

Hon. Paul J. Curran
United States Attorney for the
Southern District of New
York
One St. Andrew's Plaza
New York, New York 10007
By Patrick H. Barth, Esq.
Assistant United States
Attorney

CARTER, District Judge

O P I N I O N

Plaintiff claims that he is entitled to a reward for supplying information to the Internal Revenue Service which established tax evasion on the part of the Twentieth Century Fox Film Corporation.[1] The United States moves pursuant to Rule 12(b), F.R.Civ.P., for an order dismissing the complaint for lack of subject matter jurisdiction and for failure to state a claim on which relief can be granted. The motion is granted.

The statutory provision which authorizes payment of a reward to an informant is §7623 of the Internal Revenue Code, 26 U.S.C. §7623, which provides as follows:

> "The Secretary or his delegate, under regulations prescribed by the Secretary or his delegate, is authorized to pay such sums, not exceeding in the aggregate the sum appropriated therefor, as he may deem necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws, or conniving at the same, in cases where such expenses are not otherwise provided by law.'

Pursuant to §7623, the Service has adopted Regulation §31.7623-1, which authorizes each district director to pay such rewards as "he deems suitable."

Although the Internal Revenue Service is improperly named as the defendant, this will be deemed to be an action against the United States. Yannicelli v. Nash, 354 F. Supp.

---

[1] Plaintiff allegedly submitted claim #20-667-2415 to the Service on November 27, 1970. The corporation's asserted tax liability is claimed to have arisen from the transfer abroad of funds in connection with the making of the film, "The Bible." Plaintiff claims that he has been deprived of his reward because the Service has not audited the corporation.

143, 149 (D.N.J. 1974). The United States may not be without its consent, and in order to establish that th court has subject matter jurisdiction, plaintiff must s that there is a specific statutory provision whereby th United States has waived its sovereign immunity with respect to the claims asserted in the complaint. Barr v. Mateo, 360 U.S. 584 (1959); Schein v. United States, 352 F. Supp. 182 (E.D.N.Y. 1972). Plaintiff has not invoked any such provision, but the court will consider several possible bases of subject matter jurisdiction: 28 U.S.C. §§1340, 1346(a)(2) (implied contract); the Federal Tort Claims Act, 28 U.S.C. §§1346(c), 2671 et seq.; mandamus, 28 U.S.C. §1361; and the Administrative Procedure Act, 5 U.S.C. §701 et seq.

28 U.S.C. §§1340, 1346(a)(2) (Implied Contract)

Section 1340 of the Judicial Code provides in part that "[t]he district courts shall have original jurisdiction of any civil action arising under [the Internal Revenue Code]". This section has been construed as a general grant of jurisdiction which nonetheless authorizes suit only where the United States has specifically consented to be sued under some other statutory provision, generally 28 U.S.C. §1346. Yannicelli v. Nash, supra, 354 F. Supp. at 149; see Phillips v. United States, 346 F. 2d 999 (2d Cir. 1965).

At least one case has held that a claim for reward alleges in substance that the provision for reward gives rise to an implied contract; in that case, the court held that the district court had jurisdiction over an action on the alleged implied contract under 28 U.S.C. §1346(a)(2). Barker v. Lein, 366 F. 2d 757 (1st Cir. 1966). Section 1346(a)(2) provides that the district courts shall have jurisdiction over any claim against the United States, not in excess of $10,000, based upon, inter alia, "any express or implied contract with the United States***."

However, a line of authorities have dismissed complaints based on alleged implied contracts for failure to state a claim on which relief can be granted. Barker v. Lein, supra, 366 F. 2d at 758; Gordon v. United States, 92 Ct. Cl. 499, 36 F. Supp. 639 (1941); Katzberg v. United States, 93 Ct. Cl. 281, 36 F. Supp. 1023 (1941); Chase v. United States, 103 Ct. Cl. 80, 60 F. Supp. 211 (1945). In each of these cases, the court has held that the provision of Regulation §31.7623-1 or its predecessor authorizing the district director to award such sums "as he deems suitable" does not constitute an offer of any definite or ascertainable sum. Therefore, these courts have held, no contract arose from the provision for reward. I concur in this view and hold that the complaint fails to state a claim for breach of implied contract on which relief can be granted.

An alternative ground of decision is that since §7623 of the Internal Revenue Code does not give rise to an implied contract, 28 U.S.C. §§1340 and 1345(a)(2) do not provide a basis of subject matter jurisdiction. Schein v. United States, supra, 352 F. Supp. at 186. [2]

The Tort Claims Act, 28 U.S.C. §§1346(c), 2671 et seq.

By the Federal Tort Claims Act, the United States has waived immunity with respect to certain actions in tort. 28 U.S.C. §2674. However, the waiver does not apply to "[a]ny claim *** based upon the exercise or performance or the failure to exercise or perform a discretionary duty on the part of a federal agency *** ." 28 U.S.C. §2680(a). Section 7623 of the Internal Revenue Code states that Internal Revenue officials are to pay as rewards such sums as they "may deem necessary", indicating that the determination to be made is discretionary. The regulations enacted pursuant to §7623 reinforce this conclusion. Regulation §301.7623-1 provides in pertinent part:

> "(a) *** A district director may approve such reward as he deems suitable for information that leads to the detection and punishment of any person guilty of violating any internal revenue law *** .
>
> * * *
>
> "(c) *** All relevant factors *** shall be taken into account by a district director in determining whether a reward shall be paid, and, if so, the amount thereof. *** "

---

[2] Divonne's claim for $500,000 also exceeds the $10,000 jurisdictional maximum of 28 U.S.C. §1346(a)(2).

The instant claim for reward is clearly excluded from the Tort Claims Act by 28 U.S.C. §2680(a). Moreover, it is most doubtful that the claim sounds in tort. As a result, 28 U.S.C. §1346(c), the jurisdictional provision corresponding to the Tort Claims Act, does not confer subject matter jurisdiction on the court.

Mandamus, 28 U.S.C. §1361; Administrative Procedure Act, 5 U.S.C. §701 et seq.

For similar reasons, jurisdiction cannot properly be based on the mandamus provision of the Judicial Code or on the Administrative Procedure Act. The mandamus provision, 28 U.S.C. §1361, provides:

> "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

It is settled that mandamus does not lie to compel an officer or agency to perform a discretionary function such as that authorized by §7623 of the Internal Revenue Code. As the court stated in Schein v. United States, supra:

> "Relief against administrative action or non-action under the court's mandamus jurisdiction, 28 U.S.C. §1361, is available only where a governmental officer or employee has failed 'to perform a duty owed to the plaintiff.' The District Director here was clearly under no duty to allow plaintiff a reward or any other form of compensation. As defendants point out, mandamus does not lie to compel a change in the exercise of discretion so as to produce the action desired by the plaintiff. [citations omitted]." 352 F. Supp. at 186-87; see Parker v. Kennedy, 212 F. Supp. 294, 295 (S.D.N.Y. 1965).

Similarly, the right to review provided by §702 of the Administrative Procedure Act does not apply to agency action "to the extent that *** [the] action is committed to agency discretion by law." 5 U.S.C. §701(a)(1); Kletchka v. Driver, 411 F. 2d 436, 442-43 (2d Cir. 1969). Accordingly, the Administrative Procedure Act does not furnish a basis of subject matter jurisdiction. Schein v. United States, supra, 352 F. Supp. at 186.

Accordingly, the complaint is dismissed for failure to state a claim in implied contract and for lack of subject matter jurisdiction.

SO ORDERED.

Dated: New York, New York
July 14, 1975

Robert L. Carter

ROBERT L. CARTER
U.S.D.J.

COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

FRANKLIN STATE BANK, :

Plaintiff, :

-v- :

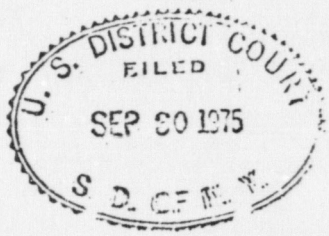
72 CIV. 2135

UNITED STATES OF AMERICA and :
COMMISSIONER OF INTERNAL REVENUE,

:

Defendants. :

- x



#4/3150

APPEARANCES

GEORGE M. STROMBERG
276 Fifth Avenue
New York, New York 10001

Attorney for Plaintiff

HON. PAUL J. CURRAN
United States Attorney
By: William G. Ballaine
Asst. U. S. Atty.
United States Courthouse Annex
One Saint Andrew's Plaza
New York, New York 10007

CONSTANCE BAKER MOTLEY, D. J.

EXHIBIT 2 TO LEGAL APPENDIX

MEMORANDUM OPINION AND ORDER

Plaintiff Franklin State Bank has brought this action against the United States asserting jurisdiction under the Federal Tort Claims Act, 28 U.S.C. § 1346(b). The bank seeks to recover damages for the allegedly negligent loss by the government of property in which the bank held a purchase money security interest at the time of the loss.

Findings of Fact

The relevant facts in this case are largely undisputed. On March 25, 1971, plaintiff bank obtained by assignment a security agreement in the sum of $5,128.51 covering a 1971 Allied 7000 Ho Ram machine ("Ho Ram") which had been purchased by Alan Doty, Inc. A financing statement was duly filed in the office of the County Clerk of Westchester County on March 29, 1971, and in the office of the Department of State of the State of New York on March 30, 1971. Alan Doty, Inc. paid to the bank the first installment under the security agreement and accompanying note, which was due on April 27, 1971 in the amount of $427.44 and failed to pay any further installments.

On June 18, 1971 defendant Commissioner of the Internal Revenue Service made an assessment against Alan Doty, Inc., in the sum of $39,391.26 for employee withholding taxes due for the first quarter of 1971. On August 6, 1971, a notice of federal tax lien was filed with the Secretary of State of the State of New York for said assessment. On August 9, 1971, the Ho Ram was levied against and seized by duly authorized agents of defendants in connection with the collection of taxes due under that assessment. At that time, the Ho Ram along with other equipment was being used by Alan Doty, Inc. in connection with construction work it was performing on a project at West Point Military Academy. The defendants' agents took the Ho Ram and other items of property and segregated them at an isolated location within West Point, tagging each item as having been seized by the Internal Revenue Service.

On or about August 24, 1971, the bank received a letter from Alan Doty, Inc., suggesting that the bank pick up the Ho Ram at West Point "for resale in an effort to recoup monies you have invested in this unit." (Exh. F, Stipulation of Facts.) Accordingly, on or about August 31, 1971, agents of the bank went to West Point and removed the Ho Ram from the premises to New Jersey.

Having learned of this, Revenue Agent Gleason communicated with George Stromberg, an attorney representing the bank. Mr. Gleason told Mr. Stromberg that the Ho Ram removed from West Point at the direction of the bank had been under seizure and had to be returned. Mr. Stromberg agreed to return the Ho Ram to defendants' agents so that it could be appraised for its sales value both separately and as part of a bulk sale of the items of property which had been seized at West Point, but he advised Mr. Gleason of the bank's prior security interest in the Ho Ram. Mr. Gleason noted that he was already aware of this security interest. Further details of this conversation are disputed by the parties to this action, but, as will be shown, a resolution of these discrepancies is not essential to the court's disposition of the matter.

Following the conversation between Mr. Gleason and Mr. Stromberg, the Ho Ram was returned to West Point by the plaintiff, and on September 8, 1971, plaintiff sent a letter to the Internal Revenue Service, to the attention of Mr. Gleason, stating that the balance due to plaintiff on the security agreement was $4,701.14, together with copies of the security agreement, promissory note and financing statement. Sometime during September 1971, defendants'

agents were advised that Alan Doty, Inc. had paid in full the amount of taxes which had been assessed against it, and on September 28, 1971, they released the levy and delivered the Ho Ram to Alan Doty, Inc.

Plaintiff bank was not notified either before or after September 28, 1971 by defendants' agents that the Ho Ram was being or had been returned to Alan Doty, Inc. Since September 28, 1971, the bank has been unable to locate the Ho Ram or Alan Doty, Inc., and there is still due and owing under the security agreement the sum of $4,701.14, plus interest. By a letter dated April 14, 1972, addressed to the Commissioner of Internal Revenue (Exh. I, Stipulation of Facts), the bank demanded the return of the Ho Ram, but did not make any statement of money damages claimed. No other written claim or demand was made by the bank to defendants prior to the commencement of this action on May 18, 1972.

Conclusions of Law

Plaintiff claims that defendants' failure to safeguard the Ho Ram for plaintiff or to notify plaintiff that the tax levy against Doty had been vacated or to find out who was entitled to possession of the Ho Ram before

delivering it to Alan Doty, Inc., constitutes a cause of action sounding in negligence or conversion against defendents. (Pl's Request for Conclusions of Law, 3-4.) The court does not reach the merits of such claims, because the court finds itself to be without subject matter jurisdiction in the instant case.

Plaintiff maintains that the jurisdiction of this court arises under 28 U.S.C. § 1346(b), the Federal Tort Claims Act. However, before jurisdiction may be established pursuant to that section, an aggrieved party must exhaust its administrative remedies by filing a statement of its claim with the appropriate agency pursuant to 28 U.S.C. § 2675. Title 28, § 2675, provides as follows:

> "An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims

as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim or counterclaim." (Emphasis added)

The filing of such an administrative claim has been held to be an "absolute prerequisite" to the filing of a Federal Tort Claims action and "a jurisdictional requirement. . .not capable of a waiver or subject to an estoppel." Best Bearings Co. v. United States, 463 F.2d 1177, 1179 (7th Cir. 1973). See also Powers v. United States, 390 F.2d 602 (9th Cir. 1968); Hlavac v. United States, 356 F.Supp. 1274 (D. C. Ill. 1972). Since the issue involved goes to the subject matter jurisdiction of this court, it must be considered even though it was first raised by defendants in post-trial Proposed Findings of Fact and Conclusions of Law. It is axiomatic that questions of subject matter jurisdiction may be considered at any point in the trial process or thereafter. Fed. R. Civ. P. 12(h)(3). See generally Wright & Miller, Federal Practice and Procedure: Civil § 1393. Nor does it have any import that the court refused to dismiss the case earlier, when defendants attempted to show lack of subject matter jurisdiction on other grounds (Memorandum Opinion and Order, March 12, 1973), since "[i]t is the duty of a federal

district court to dismiss an action whenever the court is satisfied that a controversy within its jurisdiction is not involved." Jackson v. Kuhn, 254 F.2d 555, 559 (8th Cir. 1958) (emphasis supplied).

In the instant case, it seems clear that plaintiff has not met the prerequisites set forth in 28 U.S.C. § 2675 for the establishment of subject matter jurisdiction. The only communication from the bank to the Internal Revenue which in any sense could be considered a § 2675 "claim" would be the letter of April 14, 1972, in which Mr. Stromberg, the bank's attorney, stated that "demand is hereby made upon you that you return or cause to be returned the said machine to the aforenamed bank." But 28 CFR § 14.2 specifies that an administrative claim must be "accompanied by a claim for money damages in a sum certain for injury to or loss of property. . ." The courts have been rigorous in requiring that such money damages be specified in "sum certain." See, e.g., Avril v. United States, 461 F.2d 1090, 1091 (9th Cir. 1972); Bialowas v. United States, 443 F.2d 1047, 1049 (3rd Cir. 1971). Moreover, even assuming arguendo that plaintiff's April 14, 1972 letter to the Commissioner of Internal Revenue was an adequate administrative claim, which it was not, jurisdiction

would not lie under 28 U.S.C. § 1346(b) because plaintiff commenced this action prior to receiving a denial of its claim or waiting for the expiration of six months as required under 28 U.S.C. § 2675(a). Walley v. United States, 366 F.Supp. 268 (E.D. Pa. 1973).

Although ordinarily failure to file an adequate administrative claim is grounds for dismissal without prejudice, in cases such as this, where the two year statute of limitations created by 28 U.S.C. § 2401 has already run, the claim against the government is forever barred. Robinson v. United States Navy, 342 F.Supp. 381 (E.D. Pa. 1972). This is the rule absent a showing of deception or of an intentional "sitting on its rights" by the government, and no such showing has been made in this case. Joyce v. United States, 474 F.2d 215, 218 (3rd Cir. 1973). While such a rule may seem arbitrary, it rests on the theory that the Federal Tort Claims Act represents a statutory relinquishment of the Sovereign immunity of the United States, and as such, requires a clear and specific showing of its applicability before being utilized. Dalehite v. United States, 346 U.S. 15, 30-31 (1953).

The complaint is dismissed for lack of subject matter jurisdiction.

Submit Order on five days' notice.

Dated: New York, New York
September 29, 1975

SO ORDERED

CONSTANCE BAKER MOTLEY
U. S. D. J.

The complaint is dismissed for lack of subject matter jurisdiction.

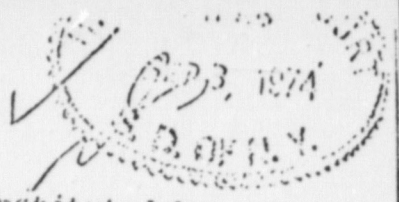
Submit Order on five days' notice.

Dated: New York, New York

September 29, 1975 SO ORDERED

CONSTANCE BAKER MOTLEY
U. S. D. J.

Ruderer v. Mitchell - 74 Civ. 1019 (E.W.)



This is one of three related suits instituted by plaintiff in this court; the other two actions were dismissed. Ruderer v. Vance, Civ. No. 74-1535 (S.D.N.Y., June 6, 1974); Ruderer v. Nixon, Civ. No. 74-1426 (S.D.N.Y., June 6, 1974). In addition, since 1965 plaintiff has commenced more than fifty lawsuits against various federal officials in courts throughout the nation, most of which are based upon substantially similar claims. Here, plaintiff alleges that defendant and others have unlawfully prevented him from redressing certain grievances in the courts. Plaintiff made substantially identical allegations in an action he instituted against "United States Army, Richard M. Nixon, Commander" in July 1973 in the United States District Court for the District of Columbia. C.A. No. 1389-73 (D.D.C., July 11, 1973). That complaint was dismissed on November 19, 1973 for, inter alia, failure to state a claim upon which relief could be granted or over which the court had jurisdiction. "[R]es judicata may be invoked against a plaintiff who had previously asserted essentially the same claim against different defendants

EXHIBIT 3 TO LEGAL APPENDIX

where there is a close or significant relationship between successive defendants." Camboez v. Yelencics, 468 F.2d 837, 841 (3d Cir. 1972); see Bruszewski v. United States, 181 F.2d 419, 422 (3d Cir.), cert. denied, 340 U.S. 865 (1950). The court finds such a relationship between the defendant here and the defendants in the District of Columbia case. The District of Columbia case having been dismissed on the merits, this action is barred by the doctrine of res judicata. The defendant's motion to dismiss is therefore granted.

In light of the foregoing, plaintiff's motions to order the commencement of pretrial discovery or, in the alternative, for summary judgment, and for an order directing the defendant or his counsel to declare this action to be a suit against the United States, are denied as moot.

SO ORDERED.

Dated: New York, New York
August 30, 1974

U. S. D. J.

Form 280 A-Affidavit of Service by Mail
Rev. 3/72

AFFIDAVIT OF MAILING CA 75-7552

State of New York)
County of New York) ss

Pauline P. Troia being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 12th day of December 1975 she served a copy of the within

brief of defts appellees

by placing the same in a properly postpaid franked envelope addressed:

Samuel Schein, Esq.,
125 East 18th St.
Bklyn, NY 11226

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Annex, ~~Foley Square,~~ Borough of Manhattan, City of New York.
One St. Andrews Plaza

Pauline P. Troia

Sworn to before me this

12th day of December 1975

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977